



TC07243

Appeal number: TC/2019/00637

Income tax – self assessment – late filing – reasonable excuse – yes – special circumstances – no – appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR ANDREAS GEORGIU

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

TRIBUNAL JUDGE JAMES AUSTEN

The Tribunal determined the appeal on 1 July 2019 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 31 January 2019 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 12 April 2019 and the Appellant's Reply dated 30 April 2019 (with enclosures).

DECISION

1. This is an appeal by Mr Andreas Georgiou (“the appellant”) against the following penalties:

(1) £100 imposed under Paragraph 3 of Schedule 55 Finance Act 2009 (“FA09”) for the late filing of the Individual Tax Return for the year ending 5 April 2017;

(2) Daily penalties, totalling £900, imposed under Paragraph 4 of Schedule 55 of FA09 for failing to file the Individual Tax Return for the year ending 5 April 2017 within three months of its due date; and

(3) £300 imposed under Paragraph 5 of Schedule 55 of FA09 for failing to file the Individual Tax Return for the year ending 5 April 2017 within six months of its due date.

2. I allow the appeal and set aside the penalties for the reasons set out below.

Background

3. HMRC claims that it sent a notice to file an individual tax return to the appellant for the tax year 2016/17 on 6 April 2017. There is every reason to doubt that date (see *Platt v HMRC* [2019] UKFTT 0303 (TC) at [11]-[12]), but the appellant acknowledged in his Reply that the due date for filing was either 31 October 2017 for a paper return or 31 January 2018 for an online return and as a result, nothing turns on the point. The appellant was within the self-assessment filing regime for that tax year and he knew and accepted the dates by which his return would have to be made to HMRC.

4. The appellant instructs an accountant in general practice (Mr Ridler, of MJ Ridler Accounting Services (“Mr Ridler”)) to prepare and file his tax returns on the basis of information supplied by him. The evidence of the appellant and Mr Ridler is that Mr Ridler submitted an online return on behalf of the appellant at 0900 on 5 September 2017. By way of evidence for this, the appellant submits a letter from Mr Ridler dated 22 April 2019 in which he (re-)confirms these details and supplies an alphanumeric “Submission Receipt Number”, which (I infer) he says he received on submission of the appellant’s tax return. HMRC states that it has no record of that filing.

5. HMRC says that on or around 13 February 2018, it sent a late filing penalty to the appellant. As a result of the nature of HMRC’s internal systems and processes, no copy of that penalty notice is before the Tribunal. Receipt of that purported notice is not admitted by the appellant – in fact, the episode is not covered at all in his evidence. However, there is a record on the printout of the appellant’s “SA Notes” provided by HMRC which reads as follows:

7. 22/03/2018 DMS ID 000027 c155265 – DOR 8-3-18. Appeal against 16-17 LFP because IT difficulty with UTR number not displayed. Appeal rejected as unclear what problem encountered & ITR still not received. Appeal opened & close, SA633 and SA634 issd. No other DMS

6. From this, I infer that the appellant or someone on his behalf (possibly Mr Ridler) contacted HMRC on 22 March 2018 to appeal against an initial late filing penalty and that appeal was dismissed by HMRC for the reasons stated. I accept that record (as I have understood it) as fact of the matters reported. As a result, I find on the balance of probabilities that the initial penalty had indeed been sent by HMRC to the appellant on or around 13 February 2018. No other explanation for the entry seems likely.

7. Because the appellant's evidence does not deal with this exchange, it is not possible conclusively to identify what if any steps he took after 22 March 2018. HMRC's printout of the appellant's "SA Notes" includes entries on 23 May (x2), 24 May and 26 June, which seem to indicate that contact was initiated on those dates by the appellant or someone on his behalf. In any event, it is clear from the appellant's evidence that throughout this period he believed HMRC to be mistaken that his tax return was not submitted and that the penalties issued had been raised in error.

8. HMRC refers me in its paper hearing submission to the case of *Kwiecinski v HMRC* (TC/2017/08739). I take no account of that case for the reasons I gave in *Angela Griffiths v HMRC* (TC/2019/00633) at [7] to [14]. The decision in *Kwiecinski* is unpublished, not binding and from the passages selectively quoted by HMRC does not appear accurately to state the law post-*Edwards v HMRC* [2019] UKUT 131 (TCC). HMRC ought not to be referring to it.

9. HMRC states that it wrote to the appellant on 25 May 2018 and 27 June 2018 to request submission of his tax return. The appellant makes no mention of the letter of 25 May and it is not clear from the papers I have whether or not this was received. However, in reply to the 27 June letter, Mr Ridler telephoned Mrs Weir of HMRC's Cumbernauld office on 10 July to query HMRC's understanding of the position. On the same day, Mr Ridler wrote a letter to Mr Hickling of HMRC's Late Penalties Reasonable Excuse Team, recording his discussion with Mrs Weir in relevant part as follows:

I have spoken today to a Mrs Weir of your Cumbernauld office who has confirmed receipt of the Tax return 2016/17. She has suspended collection of penalties and agreed that the verify.gov identification system is extremely cumbersome.

In view of this I request that all legal proceedings be halted. You should be able to find my client's return on your systems.

10. This exchange is not discussed in HMRC's statement of case. Unfortunately, the printout of the "SA Notes" only goes to 3 July 2018 and does not cover this

exchange. I find that the discussion occurred as related by Mr Ridler in his letter of the same day to Mr Hickling.

11. The appellant sets out his opinion (which is not strictly evidence) in his Reply that “[d]espite the above assurance from M[r]s Weir on behalf of HMRC, HMRC failed to [sic] properly update their records and continued to suggest that I had not filed my tax return on time.” It is clear from the papers before me that HMRC did not take the actions which I have found Mrs Weir said it would.

12. On 31 July 2018, daily penalties amounting to £900 were raised by HMRC. On 10 August, a £300 six-month penalty was raised by HMRC. Copies of those penalties have not been provided to the Tribunal but the appellant does not dispute receipt of them.

13. In response to those penalty notices, Mr Ridler submitted a paper tax return on behalf of the appellant on 30 August 2018. The appellant explains in his Reply: “I... made an additional non-electronic filing in order to cease HMRC’s continued (albeit unjustified) pursual of late filing penalties. It is important to note that this second filing was made by way of a non-electronic submission as the verify.gov website only enables individuals to make one electronic filing per year (and Mr Ridler had already made the electronic filing on my behalf back in September 2017.”

14. HMRC supplies an un-dated report from its Digital Customer Support Team, as follows:

Andreas Georgiou...

There is no evidence to suggest that a 2016/17 tax return has been submitted online.

The customer does have an SA online enrolment. I can see that he submitted his 2015/16 tax return on 21/10/16, the same day he activated the account but he does not appear to have logged in since that date.

Unfortunately quoting a submission receipt reference number, in isolation, is not proof of submission. The customer would have received an onscreen success response, including the reference, following the successful submission.

I would have suggested that the customer tried again because the online system only allows the successful submission of one original return for any one tax year, however, I can see that a paper return was submitted on 30/08/18.

15. The appellant relates that he telephoned an HMRC employee named “Kieran” at HMRC’s Bootle office on or before 5 October 2018 because HMRC was still seeking payment of the claimed penalties. On the appellant’s evidence, Kieran informed him that all penalties were then on hold. The appellant appealed the penalties to HMRC on 5 October 2018, and the appeal form summarised his discussion with Kieran.

16. HMRC (acting by Miss D Ry, an Administrative Officer) rejected the appellant's appeal on 15 November on the basis that he had no reasonable excuse because "...we have no record of receiving any tax returns for the tax year 2016-2017 online before the deadline."

17. The appellant requested a review on 24 December 2018. He explained in the review application form that he had been taken into hospital on 17 November for surgery and "the last thing on my mind was my appeal." The appellant supplied a letter from his consultant surgeon confirming details of the surgery.

18. HMRC (acting by K Hickling, a Review Officer) rejected the appellant's appeal again on review on 15 January 2019. Mr Hickling's review took account of the appellant's surgery, but on the mistaken premise that it was being put forward as a reasonable excuse for a failure to file the tax return on time. Of course, it was not: the appellant raised his surgery in the context of dealing with his appeal – he was clearly explaining the failure to request a review in time by 15 December, as Miss Ry's letter had required. In any event, HMRC accepted the request for a review so the reasons for that delay cease to be material.

19. Mr Hickling wrote:

You advise that you submitted your return in September 2017 but have not provided any evidence of your successful online filing and so I assume none was received. When a successful submission is made by selecting the final submission button you receive on screen and email confirmations. Non receipt of the confirmation messages should have alerted you to the fact that the return had not been successfully submitted to HMRC. If it was submitted by paper no proof of postage has been provided...

You did not contact HMRC for advice or near to the filing date to advise that you were having problems filing online. You could have also submitted a paper return as soon as you were aware that you could not meet the deadline.

20. Mr Hickling also came to the view that the appellant had no reasonable excuse for what he considered to be a failure to make a timely filing and concluded that no special circumstances existed which warranted reduction of the penalties.

Additional findings of fact

21. In addition to my findings above, I find the following facts from the evidence before me:

(1) The appellant supplied the necessary information to Mr Ridler for Mr Ridler to complete his tax return online within the applicable filing deadline.

(2) Mr Ridler attempted to file the appellant's online tax return at 0900 on 5 September 2017 using HMRC's online system. In the course of that filing or attempted filing, he received an on-screen alphanumeric Submission Receipt Number, which he kept a record of. See [22] below for further discussion.

(3) Mr Ridler and the appellant honestly believed that the appellant's tax return had been filed electronically on 5 September 2017.

(4) They were fortified in that belief by the statements made by Mrs Weir on 10 July 2018.

(5) The belief of Mr Ridler and the appellant that the latter's tax return had been submitted to HMRC in a timely manner persisted for the whole period from 5 September 2017 (the date the attempt was made to file it online) to the date of the appellant's appeal to this Tribunal. In fact, it appears that they still hold to this belief and consider that HMRC's internal systems are defective in suggesting otherwise. As a result, the only reason for submission of a paper return on 30 August 2018 was, in the appellant's words, "to cease HMRC's continued (albeit unjustified) pursual of late filing penalties". The penalties would not be unjustified had the return not previously been filed. See [23] below.

22. Subject to the requirement in *Perrin* at [72] to [74] (quoted at [29] below), it is not necessary for me to come to a concluded view as to whether Mr Ridler actually managed to file a completed online return for the appellant on 5 September. I take notice of the fact that HMRC's systems are usually – though not infallibly – accurate. Nevertheless, and subject as follows, it suffices – as I find the evidence requires – that Mr Ridler and the appellant did genuinely believe that he had done so.

23. The question for this Tribunal is therefore whether their belief was reasonable in the circumstances. I consider this below.

The law on reasonable excuse and special circumstances

24. The relevant statutory provisions are set out below.

25. Paragraph 16 of Schedule 55 to FA09 relevantly provides that:

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

26. Paragraph 22 of Schedule 55 to FA09 relevantly provides that:

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

27. Paragraph 23 of Schedule 55 to the FA09 relevantly provides that:

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

Reasonable excuse

28. There is no statutory definition of “reasonable excuse” (other than the two negative propositions at Paragraph 23(2)(a)-(b) FA09), but the words have been judicially considered on a number of occasions.

29. The proper test for considering whether a reasonable excuse to a tax penalty exists has a long judicial history. I have regard to the decisions of HHJ Medd OBE QC in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 239; [1991] BVC 568 at 569-570 and Judge Guy Brannan in *Coales v HMRC* [2012] UKFTT 477 (TC) at [29], [31] and [36]. Those decisions have been superseded to a large extent by the decision of the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC) (Judge Timothy Herrington and Judge Kevin Poole). *Perrin* settled the correct test to be applied when considering reasonable excuse arguments in this Tribunal. It determined as follows:

[70] ...[T]he task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer. In making its determination, the tribunal is making a value judgment which, assuming it has (a) found facts capable of being supported by the evidence, (b) applied the correct legal test and (c) come to a conclusion which is within the range of reasonable conclusions, no appellate tribunal or court can interfere with.

[71] In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all

relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co* and *Coales*).

[72] Where the facts upon which the taxpayer relies include assertions as to some individual's state of mind (e.g. "I thought I had filed the required return", or "I did not believe it was necessary to file a return in these circumstances"), the question of whether that state of mind actually existed must be decided by the FTT just as much as any other facts relied on. In doing so, the FTT, as the primary fact-finding tribunal, is entitled to make an assessment of the credibility of the relevant witness using all the usual tools available to it, and one of those tools is the inherent probability (or otherwise) that the belief which is being asserted was in fact held; as Lord Hoffman said in *In re B (Children)* [2008] UKHL 35, [2009] 1AC 11 at [15]:

"There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

[73] Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.

[74] Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on – e.g. "I did not think it was necessary to file a return", or "I genuinely and honestly believed that I had submitted a return". In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual self assessment returns but was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse.

[75] It follows from the above that we consider the FTT was correct to say (at [88] of the 2014 Decision) that "to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account."

30. The paragraphs quoted from *Perrin* are binding on me and set out the test to be applied in this case.

Special circumstances

31. The Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC) (Nugee J and Judge Timothy Herrington) confirmed that the correct test to be applied when ascertaining if special circumstances exist is as follows:

[72] In our view, as the FTT said in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UKFTT 0744 (TC) at [99], there is no reason for the FTT to seek to restrict the wording of paragraph 16 of Schedule 55 FA 2019 by adding a judicial gloss to the phrase. In support of that approach the FTT referred to the observation made by Lord Reid in *Crabtree v Hinchcliffe* at page 731D-E when considering the scope of “special circumstances” as follows:

“the respondent argues that this provision has a very limited application... I can see nothing in the phraseology or in the apparent object of this provision to justify so narrow a reading of it”.

[73] The FTT then said this at [101] and [102]:

“101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase “special circumstances” should be given a narrow meaning.

102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC’s decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be “special”. Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty.”

[74] We respectfully agree. As the FTT went on to say at [105], *special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration.* (My emphasis)

32. The reference to judicial review principles at Paragraph 22(4) of Schedule 55 to FA09 (and commented on briefly in *Ghafoor v HMRC* [2019] UKFTT 0205 (TC) (Judge Andrew Scott and Julian Sims) at [55]) was helpfully explained in *Abel v HMRC* [2018] UKFTT 194 (TC) (Judge Tony Beare) at [19]:

...[T]he decision as to whether any particular circumstances constitute “special circumstances” is entirely a matter for the Respondents to determine in their own discretion and... their decision can be impugned only if they have acted unreasonably in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 (“*Wednesbury*”). In other words, the Tribunal is not permitted to consider the relevant facts de novo and determine whether or not it agrees with the conclusion that the Respondents have reached. Instead, it needs to consider whether, in reaching that conclusion, the Respondents have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account. As long as that is not the case, then the Respondents’ decision may be impugned only if it is one that no reasonable person could have reached upon consideration of the relevant matters. The Respondents’ decision cannot be impugned simply because the Tribunal might have reached a different conclusion upon consideration of the relevant matters de novo.

Conclusions on reasonable excuse and special circumstances

33. There is no evidence before this Tribunal to suggest that the appellant is generally dilatory or careless in his approach to tax compliance. In fact, the evidence suggests otherwise. I have found the evidence of the appellant and Mr Ridler to be internally consistent and persuasive and I have found the facts of the matter accordingly. The appellant believed at all material times that Mr Ridler had submitted his tax return online on 5 September 2017 and that HMRC’s system was incorrect in suggesting otherwise. For that reason, in his view, no penalties were properly payable for any default.

34. I have found that Mr Ridler did attempt to file the appellant’s tax return on 5 September and that he genuinely believed he had done so successfully, pointing to the alphanumeric submission receipt reference number as evidence of the fact. I do not doubt HMRC’s stated view that the existence of such a reference number is insufficient evidence that a return had successfully been filed – but that is not the question before this Tribunal. The question is whether the genuinely held belief that the return had been filed was reasonable, having regard to all the circumstances of the matter, including the state of mind of the appellant and the reasonableness of the considerations he points to in support of his belief, especially the actions and beliefs of Mr Ridler, who is a professional accountant in general practice.

35. Taking account of the test set out in *Perrin* quoted above, I conclude that the appellant’s belief that his return had been filed was both genuine and a reasonable one for him to hold in the circumstances. He relied on his accountant to file his tax return (commendably promptly, indicating a desire to comply with his obligations); his accountant believed that the electronic return had been accepted by HMRC; I have found that belief to be a reasonable one in the circumstances and I consider it unreasonable of HMRC to demand more by way of evidence for these purposes. The appellant (and Mr Ridler) genuinely – and reasonably – considered throughout the relevant period that the return had been made and accepted by HMRC and that the

penalties had been issued in error. The statements made by HMRC (particularly those of Mrs Weir) provided further justification for that view.

36. I find that there were no special circumstances.

37. In light of my decision at [35], I allow the appeal in full and set aside the penalties.

38. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

TRIBUNAL JUDGE JAMES AUSTEN

RELEASE DATE: 02 JULY 2019